133-299

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1123.

HARLOW L. STREET, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 1, 1889.

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INDEX.

	Original.	Print.
Petition filed January 16, 1888	1	1
Traverse filed November 24, 1888	4	2
Argument and submission of case	5	3
Findings of fact and conclusions of law, filed March 11, 1889	6	3
Opinion of the court	10	8
Final judgment of the court	15	14
Application for and allowance of appeal	16	14
Certificate	17	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 22, 1889.

1 In the Court of Claims.

HARLOW L. STREET
vs.
THE UNITED STATES. } No. 15882.

I.—*Petition. Filed January* 16, 1888.

To the honorable judges of the Court of Claims:

I.

Your petitioner, Harlow L. Street, respectfully represents that he is a citizen of the United States and of the State of California.

II.

That heretofore, to wit, on the 22d day of January, A. D. 1867, he was duly appointed and commissioned a second lieutenant in the Army of the United States, in the First United States Cavalry Regiment, and on the 22d day of February, 1869, he was promoted to the rank of first lieutenant in said regiment, and duly commissioned as such; that after said promotion, in the month of April, A. D. 1869, he was assigned to duty in the department of California, and was on active duty in said department from that date until about the 11th day of March, 1871, when he was relieved from duty in compliance with general order No. 1, series of 1871; that previous to said March 11, 1871, he had not been placed on waiting orders, nor was he a supernumerary officer of the Army of the United States.

2 III.

That general order No. 1 of 1871, referred to in paragraph two hereof, purported to transfer him to a list of supernumerary officers, to date from January 1, 1871, and honorably muster petitioner out of the service of the United States; but said order was, so far as petitioner is concerned, issued in contravention of law, and is, as to petitioner, void and of no effect.

IV.

That petitioner is an officer of the Army of the United States in accordance with the terms of his commission, of which he has never been deprived by due course and process of law.

V.

That petitioner has not been paid as an officer of the United States Army or for and on account of his services as first lieutenant of the First United States Cavalry for any part of the time between January 1st, A. D. 1872, and December 31st, 1887, though he has de-

manded payment of the Paymaster General of the United States, but that payment has been refused.

VI.

That there is due to petitioner for and on account of his services in the United States Army as aforesaid from the United States the pay of a first lieutenant of cavalry from January 1, 1872, to December 31, 1887, inclusive, at the rate established by law.

VII.

That petitioner was in the military service of the United States, as an enlisted man and an officer of the 2d California Cavalry, from the 17th day of September, A. D. 1861, to the 18th day of May, A. D. 1866.

3

VIII.

Petitioner states that he is the sole owner of the claim upon which this action is based; that he has not transferred or assigned any part thereof or any interest therein, and that no person other than petitioner is interested therein, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

IX.

Petitioner claims the sum of thirty-four thousand one hundred and twenty-three dollars and forty-eight cents ($34,123.48), and prays judgment against the United States therefor.

H. L. STREET.

J. M. VALE,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, John Tweedale, a notary public in and for said District, Harlow L. Street, who, being first duly sworn according to law, on oath says that he is the claimant in the foregoing petition, and that the matters and things set forth therein are true as he verily believes.

Witness my hand and notarial seal this 12th day of January, A. D. 1888.

JOHN TWEEDALE,
Notary Public.

[SEAL.]

4

II.—*Traverse. Filed November* 24, 1888.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

5 III.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington, on the 29th day of January, A. D. 1889, the case of Harlow L. Street *vs.* The United States, No. 15882, was argued by Mr. Vale, for the claimant, and Mr. Dewees, for the defendants, and submitted.

6 IV.—*Findings of Fact and Conclusion of Law. Filed March 11, 1889.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was on the 14th day of April, 1869, duly commissioned as a first lieutenant of the First United States Cavalry, in the service of the United States, to rank as such from the 22d day of February, 1869, and was holding the rank of first lieutenant of cavalry in the Army of the United States on the date and at the time of the issuance of the general order hereinafter mentioned.

II.

The claimant was reported as unfit for the proper discharge of his duties from other causes than injuries incurred or disease contracted in the line of his duties by department commander Lieut. Col. George Crook, of the Twenty-third Infantry, on the 27th of October, 1870, and by the General of the Army on the 10th of November, 1870, under the eleventh section of the act of July 15, 1870, herein referred to; his name was submitted to the board organized in pursuance of said act on the 10th of November, 1870; on the 17th of November, 1870, the board addressed the following letter to the Adjutant General of the Army, who made the following reply:

WASHINGTON CITY, D. C., *November* 17, 1870.

To Brig. Gen. E. D. Townsend, Adjutant General, U. S. Army:

SIR: I have the honor to inform you that First Lieut. Harlow L. Street, First Cavalry, has been reported to the board constituted in accordance with section 11 of the "Act making appropriations for the army," etc., as unfit for the proper discharge of his duties from

other causes than injuries incurred or disease contracted in the line of his duties.

I am directed by the president of the board to request that an opportunity be given him without delay for a hearing, in accordance with the provisions of the law.

I am, sir, very respectfully, your obedient servant,

JAMES McMILLAN,
Captain Eleventh Infantry, Recorder of the Board.

7 ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *Nov'r* 19, 1870.

Maj. Gen'l W. S. Hancock, U. S. Army, president board under sec. 11, act July 15, 1870:

GENERAL: Referring to the request of the board, dated the 17th inst., for the appearance of—

* * * * * * *

1st Lieut. Harlow L. Street, 1st U. S. Cavalry,

* * * * * * *

I have the honor to inform you that the stations of the officers named are so remote as to make it impossible for the board to consider their cases, and therefore the Secretary of War has directed that the officers be not ordered to appear. Their cases, so far as the board is concerned, are viewed as closed.

Your ob't serv't, E. D. TOWNSEND,
Adj't General.

On the 22d of November, 1870, the board returned certified extracts and other papers in the case of First Lieut. Harlow L. Street, with the following letter:

ROOM NO. 30, WINDER'S BUILDING,
WASHINGTON, D. C., *November* 22, 1870.

To the Adjutant General of the Army:

GENERAL: In compliance with instructions from the Secretary of War of the 19th instant, I have the honor to return herewith certified extracts and other papers in the cases of—

* * * * * * *

First Lieut. Harlow L. Street, First Cavalry.

* * * * * * *

I am, general, very respectfully, your obedient servant,

WINFIELD S. HANCOCK,
Major General U. S. Army, President of Board.

III.

The name of claimant was then placed upon a list for transfer to supernumerary list, as made from lists submitted in connection with the board, of which General Hancock was president, being the board organized under section 11 of the act of July 15, 1870.

IV.

On January 2, 1871 (which was on the week day Monday), the following order was issued by the Secretary of War:

(*General Orders No.* 1.)

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *January* 2, 1871.

By direction of the President, the following officers of the army are transferred, assigned, or mustered out of the service, to take effect from the 1st instant:

I.—*Transfers to the List of Supernumeraries, under Section* 12 *of the Act Approved July* 15, 1870.

* * * * * * *

First Lieutenant Harlow L. Street, First Cavalry.

* * * * * * *

8 II.—*Transfers and Assignments to Fill Vacancies to the Present Date.*

* * * * * * *

First Lieutenant Max Wessendorff, unassigned, to the First Cavalry, vice Street, transferred to the list of supernumeraries.

* * * * * * *

III.—*Unassigned Officers Whose Commissions Have Expired under Section* 12 *of the Act of Congress Approved July* 15, 1870, *and who are Honorably Mustered out of the Service.*

* * * * * * *

First Lieutenant Harlow L. Street.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
Adjutant General.

The names of all the officers who were mustered out of the service as supernumeraries under act 15th of July, 1870 (16 Stat., 315, § 12), are contained in said order, January 2, 1871, which was the only order promulgated discharging or transferring officers to the list of supernumeraries under the section.

V.

There appears among the files of the War Department the following order; but it does not appear that it was ever issued or promulgated, and the names of three officers appear upon it who were not included in the order of January 2, 1871, set forth in the preceding finding, and who were never in fact transferred; and the words "By direction of the President the following-named officers

are" appear to have been erased by a pencil mark drawn through them:

(*General Orders No.* 000.)

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *December* 000, 1870.

1. By direction of the President, the following-named officers are transferred to the list of supernumeraries, under section 12, act approved July 15, 1870:

* * * * * * *

1st Lieutenant H. L. Street, 1st Cavalry.

* * * * * * *

WAR DEPARTMENT, *Dec'r 31st*, 1870.

Approved.

WM. W. BELKNAP,
Sec'y of War.

VI.

At the time of the issuance of the order of January 2, 1871, the claimant was on active duty with his command at Fort Bidwell, Cal., and remained at that post on active duty until February 11, 1871, which was the date of the receipt of said order at said post when his muster out took effect.

9 On the 18th of September, 1871, he was paid by a paymaster of the army for the time he continued in service, viz., to the 10th of February, 1871, and also one year's pay under the act of 15th July, 1870, and the payment was made upon the following stated account, receipt, and affidavit:

The United States to Harlow L. Street, Late First Lieutenant First Cavalry.

Salary.	Months.	Pay per month.	Amount.
For myself (having served five years) from the 1st of January, 1871, to the 10th of February, 1871	$1\frac{9}{30}$	$146 66\frac{2}{3}$	$190 66
One year's pay, having been mustered out by G. O. No. 1, A. G. O., Washington, D. C., dated 2d January, 1871, 18th of ——, 18—	12	----------	1,760 00
Traveling allowance from Camp Bidwell, Cal., to Sonora, Cal, 529 miles	$\frac{26}{30}$	146 $66\frac{2}{3}$	127 11
($117.95, overpaid on this voucher, refunded to Maj. S. Woods October 3, 1872. J. A. 94.)			
($117.95, refunded to Major Woods, repaid to Street by C. H. 644,751, April 29, 1882.)			
Deduct half pay for —— months —— days on leave of absence.			
			2,077 77

I certify, on honor, that the amounts charged in the foregoing account are correct and just, as authorized by law, and that they are rightfully due me as stated, and that I am not in arrears with the United States on any account whatsoever. I further certify that I have been on leave of absence —— months, —— days, during the time by virtue of ——. I was last paid to 31st December, 1871, by Paymaster V. S. Eggleston, and I acknowledge to have received, this 18th day of September, 1871, of Paymaster Samuel Woods, U. S. A., in full of this account, the sum of $2,077.77, by check No. ——, on —— ——.

(Signed in duplicate) H. L. STREET,
Late First Lieutenant, First Regiment Cavalry.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *sct:*

Be it remembered that on this eighteenth day of September, anno Domini one thousand eight hundred and seventy-one, personally appeared before me, the subscriber, a notary public for the county aforesaid, Harlow L. Street and made oath on the Holy Evangelists of Almighty God, in due form, that the annexed account, amounting to two thousand and seventy-seven dollars and seventy-seven cents, is accurate and just, and that all the matters set forth in the within certificate signed by him are true, in substance and fact, as stated; that his place of residence is Sonora, county of Tuolumne, State of California, and that he is not indebted or accountable to the United States on any account whatsoever, and that he has not been absent, with or without leave, beyond the limits prescribed by existing laws, for any portion of the time charged for in this account; and, further, that I was on duty at Camp Bidwell when general order No. 1, dated A. G. O., Washington, D. C., 2 Jan'y, 1871, — and was not furnished transportation in kind or pay in lieu thereof for any portion of the distance to my home.

H. L. STREET,
Late 1st Lt., 1st Reg. Cav.

Sworn to the day and year above written, and subscribed in duplicate.

[SEAL.] F. I. THIBAULT,
Notary Public.

The claimant was paid the sum of $117.95 upon Treasury settlement, dated February 18, 1881, being an amount which he was required to refund to the United States, the same being the difference in the year's pay and travel pay between the amount he drew as a first lieutenant of cavalry and the amount he would have drawn if "not mounted" rates had been paid to him.

10 VII.

On the 14th June, 1880, the President nominated Second Lieutenant Robert P. P. Wainwright to be first lieutenant in the First

Regiment of Cavalry "vice Wessendorf, promoted;" and on the 16th June, 1880, the Senate confirmed the appointment, and Lieutenant Wainwright was commissioned accordingly.

Conclusion of Law.

And upon the foregoing findings of fact the court decides as conclusion of law:

The petition of the claimant should be dismissed.

V.—*Opinion of the Court.*

Opinion.

NOTT, J., delivered the opinion of the court:

The act 15th July, 1870 (16 Stat L., p. 314), provided for a reduction of the army to a force of 30,000 men. So far as the enlisted men were concerned, the method of reduction was left entirely to the discretion of the President (section 2). So far as commissioned officers were concerned, four methods were prescribed.

The first was voluntary resignation, accompanied by the inducements of an honorable discharge and one year's pay and allowances (section 3). The second was by placing officers upon the retired list, and for that purpose the limited number of the retired list was extended to three hundred (sections 3 and 4). The third was by sending officers reported as "unfit for the proper discharge of their duties" (but who were not entitled to be placed upon the retired list because their inability was not incurred "in the line of their duty") before a military board upon whose unfavorable report they were to be mustered out (section 11). The fourth was by the muster out of all officers who remained supernumerary on the first day of January, 1871 (section 12).

These being the general purposes of the statute, the eleventh and twelfth sections more particularly provided as follows:

SEC. 11. And be it further enacted, That the General of the Army and commanding officers of the several military departments of the army shall, as soon as practicable after the passage of this act, forward to the Secretary of War a list of officers serving in their respective commands deemed by them unfit for the proper discharge of their duties, from any cause except injuries incurred or disease contracted in the line of their duty, setting forth specifically in each case the cause of such unfitness. The Secretary of War is hereby authorized and directed to constitute a board to consist of one major general, one brigadier general, and three colonels, three of the said officers to be selected from among those appointed to the regular army on account of distinguished services in the volunteer force during the late war; and on recommendation of such board, the President shall muster out of the service any of the said officers so reported with one year's pay; but such muster out shall not be ordered without allowing such officer a hearing before such board to show cause against it.

SEC. 12. And be it further enacted, That the President is hereby authorized to transfer officers from the regiments of cavalry, artillery, and infantry to the list of supernumeraries, and all vacancies now existing, or which may occur prior to the first day of January next, in the cavalry, artillery, or infantry by reason of transfer, or from other causes, shall be filled in due proportion by the supernumerary officers, having reference to rank, seniority, and fitness, as provided in existing law regulating promotions in the army. And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out of the service with one year's pay and allowances: Provided, That vacancies now
11 existing in the grade of second lieutenants, or which may occur prior to said date, may be filled by the assignment of supernumerary first lieutenants, or officers of higher grade, who, when so assigned, shall rank as second lieutenants, provided such officer shall prefer to be assigned, instead of being mustered out under the provisions of this section; and officers so assigned shall take rank from the date of their original entry into the service. And provided further, That no chaplain be appointed to posts or regiments until those on waiting orders be assigned.

The object to be attained by the eleventh section was the discharge of officers who were not fit for military service and who were not deserving of the retired list. The twelfth section was comprehensive enough to embrace every officer in the army, but it was intended for those who were fit to remain in the army and against whom no ground for discharging them existed. Both sections gave to the discharged officer a parting gift; both were to be carried into effect within the same brief period. There may have been and probably were other administrative reasons not perceptible to the judiciary which rendered the machinery provided by the eleventh section desirable, and it is certain that it was resorted to by the President; but nevertheless the twelfth section gave to him ample powers to sift the personnel of the army and to accomplish the reduction, which was the chief purpose of the statute.

There were, however, two items of difference in the two sections, which affected or might affect the officers upon whom they operated. Under the eleventh section an officer was liable to be mustered out whenever the retiring board reported upon his case, and would then receive only "one year's pay," which was pay proper, and did not include allowances (Sherburne's case, 16 C. Cls. R., 491). Under the twelfth section the officer could not be mustered out until the last moment—that is to say, the 1st January, 1871—and would then receive "one year's pay and allowances." Both of these differences operated in favor of the supernumerary officers.

These two sections of the act — 1870 constitute the law of the case The facts, briefly stated, are as follows:

The claimant, then a first lieutenant of cavalry, was reported by the commanding officer of his department as deemed unfit for the proper discharge of his duty by causes other than injuries incurred or disease contracted in the line of his duty, and his name was sent

before the retiring board, then convened in the city of Washington. On the 17th November, 1870, the board requested that he and a number of other officers be given a hearing, as required by the statute. In reply to this application of the board the Adjutant General of the Army wrote:

I have the honor to inform you that the stations of the officers named are so remote as to make it impossible for the board to consider their cases, and therefore the Secretary of War has directed that the officers be not ordered to appear. Their cases, so far as the board is concerned, are viewed as closed.

Accordingly no notice was given to the claimant and no action was taken by the board, and nothing further was done until the final and decisive order under the statute was issued for the reduction of this part of the army and the discharge of all commissioned officers who were not to be permanently retained.

That order bears date and was promulgated on Monday, the 2d January, 1871, it being the first secular day of the new year. Like many orders of the War Department, it contained distinct parts or divisions and was in effect three orders with one enacting clause.

The first division directed the transfer of a large number of
12 officers to the list of supernumeraries; the second directed the transfer of another set of officers from the list of supernumeraries to various positions and vacancies on the active list; the third directed the muster-out of all officers then remaining unassigned.

The first division of this order transferred the claimant from his position in the line to the list of supernumeraries; the second transferred Lieut. Max Wesendorf from the list of supernumeraries to the position made vacant by the claimant's transfer; the third directed that the claimant be mustered out of the service.

Under that order the claimant was discharged from the service on the 10th February, 1871, and in the following September he received his year's pay and allowances, giving therefor the usual receipt. He now insists that the discharge or muster-out was illegal, and he seeks all of the intermediate pay of the office, amounting to $34,123.

The grounds upon which this demand is pressed are—

(1.) That an officer was not liable to be proceeded against under both sections of the statute, and that if the Secretary of War transmitted his name to the retiring board he could be mustered out only under the provisions of the eleventh section and after the hearing which it assured to all officers sent before the board.

(2.) That the power of the president to transfer officers to the list of supernumeraries under the twelfth section expired on the 31st December, 1870.

At the time of the adoption of the Constitution the control of the British army was lodged exclusively in the Crown with hardly a restriction set upon it, save that the continued existence of the standing army required the annual consent of Parliament. From the mutiny act, 1689, until Mr. Cardwell's act, 1879, the control of the Crown remained unchanged and practically unrestricted. The sys-

tem of purchase in the army formed a cheap and easy method for pensioning or providing for a retiring officer and for securing his services at exceedingly low pay. It moreover had been an established right, founded on unbroken usage for two centuries. An officer when he won promotion believed that he was laying up a competence for his old age—a provision for his wife and children—and the public regarded his commission as his well-earned property, lawfully accumulated and possessed of the sanctity of a vested right; yet in our own time we have seen a prime minister abolish the system (after Parliament had three times refused to do so) by royal warrant, which was in effect saying that thereafter the Crown would not allow officers to sell out and would not recognize or commission those who purchased.

This power of command and control the framers of the Constitution placed in the hands of the President, with only two restrictions set upon it: that Congress should have power "to make rules for the government and regulation of the land and naval forces;" that the appointment of officers should be "by and with the advice and consent of the Senate."

The tenure of a military office has been from the foundation of the Government among the frailest known to the law, for it has been subject to the will of the President, and that will has been repeatedly exercised. Nevertheless a usage greatly respected and upheld by the legislative and executive branches of the Government, and which certainly should be noticed and respected by the
13 judiciary, has made the tenure of a military office practically for life or good behavior. The power of removal as such—that is to say, without cause—has never been asserted in terms, it is believed, against an officer of the army or navy, and until the decision of the Supreme Court in Blake's case (103 U. S. R., 227), in 1880, was almost unsuspected.

The power to dismiss an officer, as has been said, has been repeatedly exercised, and has been recognized and sanctioned by Congress; but inasmuch as it carried with it a taint of dishonor, and was resorted to only in cases of shameful delinquency or gross incapacity, and was deemed by those most interested as one of the severest penalties known to military law, it was proper for Congress to regulate and restrict its application under the constitutional authority vested in them. (Acts 17th July, 1862; 3d March, 1865; 17th July, 1866, 12 Stat. L., p. 596; 13 *id.*, p. 489; 14 *id.*, p. 92; Blake's case, 103 U. S. R., 227.)

Still the limitation was itself limited. The purpose of the act — 17th July, 1866, was not to attach a life tenure or element of vested right to the office, but to save officers "in time of peace" from the ignominy of a hasty and dishonorable dismissal. The practical results of the statute, in connection with the other provisions of law bearing upon the subject, are these—that in time of war the President may dismiss an officer from the service at any moment and for any cause; that in time of peace he may dismiss him for cause with the co-operation of a court-martial, or remove him without cause with the consent of the Senate.

The acts of 1866 and 1870 are therefore neither in conflict nor *in pari materia*. They spring from different provisions of the Constitution. The one is an exercise of the legislative power "to make rules for the Government and regulation of the land and naval forces;" the other of the power "to raise and support armies." The former relates to the punishment or protection of the individual officer; the latter to the army at large. It was the purpose of the one to secure to each officer a trial by court-martial in all cases "in time of peace;" it was the purpose of the other to reduce the army of the United States from forty-five to twenty-five regiments.

The fundamental error of the claimant's case, in the opinion of the court, lies in the supposition that the President, under the act, became in this matter *functus officio* on the 31st December, 1870. If the statute had been enacted to confer a privilege upon the President or a benefit upon the officer; if it were with officers as it is with privates, that an honorable discharge with a year's pay and allowances would be accepted at any time by every enlisted man in the army, and esteemed extraordinary good fortune, it might be held that the power to grant discharges must be exercised *strictissimi juris*, "prior to the first day of January next."

But the purpose of the statute was neither to confer privileges, nor create benefits, nor authorize forfeitures. The single object of the enactment was to place the army upon a permanent peace footing of twenty-five regiments. It cast upon the President the responsibility of carrying the enactment into effect and constituted him the sole agent of the Government to execute the legislative fiat. It gave the agent means for acting, and prescribed a period of action, and directed him to perform the duty within that time. Such a power is of course to be executed, if that be possible, within the prescribed time; but to hold that if it be not it cannot be executed at all would be to hold that the laches or inability or accident or mistake of an executive officer should defeat the legislative will.

14 The statute did not execute itself. It provided for reduction by resignation, by retirement, by the selection of a retiring board, and by the selection of the President. All of these means united to make the plan of reduction. The officers upon the list of supernumeraries were not there because of their demerits. They were entitled to the consideration of the President, and the Government was entitled to the benefit of selection from them. The list had been founded upon what might be termed juniority. When two companies were consolidated, each having, say, its own second lieutenant, the junior became a supernumerary; hence the list of supernumeraries may have contained the best and most deserving officers in the service, and it was a cardinal element in the scheme that such should be retained.

A paper has been introduced by the defendant from the files of the War Department purporting to be an order of the President, signed by the Secretary of War December 31, 1870, entitled general orders 000, and dated December 000, 1870; and the claimant has offered evidence tending to show that the signature of the Secretary

was not affixed until the 2d January, 1871. The court, however, must reject both the paper and the evidence to contradict its date. In the case of a proclamation of the President, it was held by the Supreme Court that the proclamation must be proved by its record, and that evidence could not be introduced to show that it was dated at one time and promulgated at another. (La Peyre's case, 17 Wall. R., 191.) In the present instance the court must go by the record of the War Department. A paper found in its files, which was never issued, which was never promulgated, which was never executed, and which, if it ever existed as an intended order and not as a mere memorandum, was immediately supplanted by a formal order (that of January 2, 1871), duly entitled, promulgated, and carried into execution, cannot be regarded by the court as the order of the President whereby he executed and carried into effect the statute for the reduction of the army.

The defense must stand or fall on the real order of the President and its record, the order by which he finally and only sought to transfer the claimant to the list of supernumeraries, and to muster him out as such, the order of January 2, 1871, entitled "General orders No. 1."

The case then stands in this condition: That the statute (section 12), without specifying a time, authorized the President to transfer officers to the list of supernumeraries, and in terms required that all vacancies which might occur in the line "prior to the 1st day of January," 1871, should be filled "by supernumerary officers;" that on the 31st December, 1870, no transfers had been made to the list of supernumeraries, and no vacancies existed in the line, and no officers had been mustered out on the recommendation of the retiring board. The 1st of January, 1871, fell on Sunday, a *dies non* in the clerical work of the War Department, so that the question resolves itself into this, whether the President was required to issue two orders, the one on the 31st December, 1870, transferring officers, the other on the 1st January, 1871, mustering out all who had not been assigned.

The court is of the opinion that, in view of the constitutional functions of the President, in view of the restricted purpose of the act —1866, in view of the general purpose of the act—1870, Congress did not intend to make the reduction of the army conditional upon its being carried into effect within a designated time, and that it was equally beyond the legislative intent that one provision of the statute should be carried into effect and another should fail; in other words, the court is of the opinion that the power of the President to carry into effect the provisions of the law continued until his entire duty was performed.

The judgment of the court is that the petition of the claimant be dismissed.

The acts of 1866 and 1870 are therefore neither in conflict nor *in pari materia*. They spring from different provisions of the Constitution. The one is an exercise of the legislative power "to make rules for the Government and regulation of the land and naval forces;" the other of the power "to raise and support armies." The former relates to the punishment or protection of the individual officer; the latter to the army at large. It was the purpose of the one to secure to each officer a trial by court-martial in all cases "in time of peace;" it was the purpose of the other to reduce the army of the United States from forty-five to twenty-five regiments.

The fundamental error of the claimant's case, in the opinion of the court, lies in the supposition that the President, under the act, became in this matter *functus officio* on the 31st December, 1870. If the statute had been enacted to confer a privilege upon the President or a benefit upon the officer; if it were with officers as it is with privates, that an honorable discharge with a year's pay and allowances would be accepted at any time by every enlisted man in the army, and esteemed extraordinary good fortune, it might be held that the power to grant discharges must be exercised *strictissimi juris*, "prior to the first day of January next."

But the purpose of the statute was neither to confer privileges, nor create benefits, nor authorize forfeitures. The single object of the enactment was to place the army upon a permanent peace footing of twenty-five regiments. It cast upon the President the responsibility of carrying the enactment into effect and constituted him the sole agent of the Government to execute the legislative fiat. It gave the agent means for acting, and prescribed a period of action, and directed him to perform the duty within that time. Such a power is of course to be executed, if that be possible, within the prescribed time; but to hold that if it be not it cannot be executed at all would be to hold that the laches or inability or accident or mistake of an executive officer should defeat the legislative will.

14 The statute did not execute itself. It provided for reduction by resignation, by retirement, by the selection of a retiring board, and by the selection of the President. All of these means united to make the plan of reduction. The officers upon the list of supernumeraries were not there because of their demerits. They were entitled to the consideration of the President, and the Government was entitled to the benefit of selection from them. The list had been founded upon what might be termed juniority. When two companies were consolidated, each having, say, its own second lieutenant, the junior became a supernumerary; hence the list of supernumeraries may have contained the best and most deserving officers in the service, and it was a cardinal element in the scheme that such should be retained.

A paper has been introduced by the defendant from the files of the War Department purporting to be an order of the President, signed by the Secretary of War December 31, 1870, entitled general orders 000, and dated December 000, 1870; and the claimant has offered evidence tending to show that the signature of the Secretary

was not affixed until the 2d January, 1871. The court, however, must reject both the paper and the evidence to contradict its date. In the case of a proclamation of the President, it was held by the Supreme Court that the proclamation must be proved by its record, and that evidence could not be introduced to show that it was dated at one time and promulgated at another. (La Peyre's case, 17 Wall. R., 191.) In the present instance the court must go by the record of the War Department. A paper found in its files, which was never issued, which was never promulgated, which was never executed, and which, if it ever existed as an intended order and not as a mere memorandum, was immediately supplanted by a formal order (that of January 2, 1871), duly entitled, promulgated, and carried into execution, cannot be regarded by the court as the order of the President whereby he executed and carried into effect the statute for the reduction of the army.

The defense must stand or fall on the real order of the President and its record, the order by which he finally and only sought to transfer the claimant to the list of supernumeraries, and to muster him out as such, the order of January 2, 1871, entitled "General orders No. 1."

The case then stands in this condition: That the statute (section 12), without specifying a time, authorized the President to transfer officers to the list of supernumeraries, and in terms required that all vacancies which might occur in the line "prior to the 1st day of January," 1871, should be filled "by supernumerary officers;" that on the 31st December, 1870, no transfers had been made to the list of supernumeraries, and no vacancies existed in the line, and no officers had been mustered out on the recommendation of the retiring board. The 1st of January, 1871, fell on Sunday, a *dies non* in the clerical work of the War Department, so that the question resolves itself into this, whether the President was required to issue two orders, the one on the 31st December, 1870, transferring officers, the other on the 1st January, 1871, mustering out all who had not been assigned.

The court is of the opinion that, in view of the constitutional functions of the President, in view of the restricted purpose of the act —1866, in view of the general purpose of the act—1870, Congress did not intend to make the reduction of the army conditional upon its being carried into effect within a designated time, and that it was equally beyond the legislative intent that one provision of the statute should be carried into effect and another should fail; in other words, the court is of the opinion that the power of the President to carry into effect the provisions of the law continued until his entire duty was performed.

The judgment of the court is that the petition of the claimant be dismissed.

15 VI.—*Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 11th day of March, A. D. 1889, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Harlow L. Street, be dismissed.

BY THE COURT.

16 VII.—*Application of Claimant for and Allowance of Appeal.*

HARLOW L. STREET
vs.
THE UNITED STATES. } 15882.

From the judgment rendered in the above-entitled cause on March 11th, 1889, dismissing claimant's petition, the claimant, by his attorney, on the 28th day of March, 1889, makes application for and gives notice of an appeal to the Supreme Court of the United States.

J. M. VALE,
Att'y for the Claimant.

Filed and allowed in open court March 28, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

17 In the Court of Claims.

HARLOW L. STREET
vs.
THE UNITED STATES. } 15882.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of April, A. D. 1889.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1123. Harlow L. Street, appellant, *vs.* The United States. Filed April 1, 1889.

Office Supreme Court U. S.
FILED.
SEP 3 1889
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

HARLOW L. STREET,

vs.

THE UNITED STATES.

No. 1123.

Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, BRIEF OF ARGUMENT AND ARGUMENT.

J. M. VALE,
Attorney for Appellant.

IN THE

Supreme Court of the United States.

October ~~DECEMBER~~ TERM, 1889.

HARLOW L. STREET,

vs.

THE UNITED STATES.

No. 1123.

Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, BRIEF OF ARGUMENT AND ARGUMENT.

STATEMENT OF THE CASE.

This is an action brought to recover salary claimed to be due to the plaintiff as 1st Lieutenant of the 1st United States Cavalry from January 1, 1872, to December 31, 1887.

Fully stated the facts in this case as found by the court below, are as follows:

Appellant was commissioned a 1st Lieutenant of the First United States Cavalry, to rank as such from the 22d day of February, 1869; he was reported as unfit for the proper discharge of his duties from causes other than injuries incurred or disease contracted in the line of his duties by the Department Commander, Lieut. Col. George Cook, of the 23d Infantry, on the 27th of October, 1870, and by the General of the Army on the 10th of November, 1870, under the 11th Section of the act of July 15, 1870, quoted *in extenso* in the opinion of the court below [Rec. p. 8]; his name was submitted to the board organized in pursuance of said act, on the 10th of November, 1870; on the 17th of November, 1870, the board addressed a letter to the Adjutant General of the Army, requesting that an opportunity be given appellant without delay for a hearing in accordance with the provisions of the law; to this request the Adjutant General replied on the 19th of November, 1870, stating that the station of this appellant was so remote as to make it impossible for the board to consider his case, and therefore the Secretary of War directed this appellant be not ordered to appear, and stating the case of appellant, so far as the board was concerned was viewed as closed; whereupon the board returned to the Adjutant Gen'l of the Army, the certified extracts and other papers in the case of appellant on the 22d of November, 1870, and the name of appellant was placed upon a list for transfer to the supernumerary list; on Monday January 2, 1871, the War Department issued General Order No. 1, by order of the Secretary of War, by direction of the President, signed by the Adjutant General of the Army, transferring appellant to the list of supernumeraries, assigning Max Weisendorf, then on the list of supernumeraries, or unassigned list,

vice appellant, and honorably mustering appellant out of the service, under the 12th section of the act of July 15, 1870. That order of January 2, 1871, was the only order issued discharging or transferring officers to the list of supernumeraries under section 12, of the act of July 15, 1870. When that order was issued January 2, 1871, appellant was on active duty with his command at Fort Bidwell, California, and remained at that post on active duty until February 11, 1871, which was the date of the receipt of said order at said post. On the 18th of September, 1871, appellant was last paid by a paymaster of the army, in the sum of $2,077.77, being one year's pay and allowances, but he was required to refund thereof, and did refund $117.95, being the difference in the year's pay between a 1st Lieutenant of Cavalry and the amount of pay due a "not mounted" officer; this sum was afterwards paid him on the 18th of February, 1881, upon Treasury settlement. On the 14th of June, 1880, the President nominated Second Lieutenant Robert P. Wainwright, to be 1st Lieutenant in the 1st U. S. Cavalry, vice Weisendorf promoted, which nomination was confirmed by the Senate and Wainwright was commissioned accordingly. The paper referred to in the findings of fact as dated December, 000. No. 000 was never promulgated as an order and the names of three officers appear upon it who were not included in the order of January 2, 1871, who were never in fact transferred, and the words "*By direction of the President the following officers are*" were erased by pencil mark drawn through them.

ASSIGNMENT OF ERRORS.

Appellant assigns the following errors of the court below, to wit:

1st. In holding that the act of July 15, 1870, (16 Stats. L. p. 315) provided for a reduction of the army to a force of 30,000 men, and to reduce the army from forty-five to twenty-five regiments [see Rec. pp. 8 and 12] and in construing the act of July 15, 1870, which, in fact provided in its second section for a reduction of the *enlisted* men of the army to the number of 30,000, in connection with the act of March 3, 1869, which latter act provided for reduction of the *Infantry* arm of the service from forty-five to twenty-five regiments. [See Record p. 8.]

2d. In holding that the 12th section of the act of July 15, 1870, was comprehensive enough to embrace every officer of the Army. [See Record p. 9.]

3d. In holding that in determining the jurisdiction and powers of the President of the United States, as commander-in-chief of the Army and Navy of the United States, reference might properly be had to the action of Prime Ministers of the Government of Great Britian and Ireland, in our own time. [See Record p. 11.]

4th. In holding that the act of July 15, 1870, (16 Stats, p. 315) cast upon the President the sole responsibility of carrying the enactment into effect, and constituted him the sole agent of the Government to execute the legislative fiat. [See Record p. 12.]

5th. In holding that the reply of the Adjutant General of the Army of November 19, 1870, to the letter of the board under date of November 17, 1870, operated as closing the jurisdiction of the board over the appellant's case, and remitted the appellant to the provisions of section 12, of the act of July 15, 1870.

6th. In holding that the failure to give the notice to the appellant as directed by the president of the board, left appellant in the same condition as if he had not been reported under the provis-

ions of section 11, act of July 15, 1870, and in the condition of officers embraced in the provisions of section 12 of said act.

7th. In holding that order promulgated on January 2, 1871, by its first division, lawfully transferred the appellant from his position on the active list, to the list of supernumeraries. [See Record p. 10.]

8th. In holding that the second division of the order of January 2, 1871, lawfully transferred Lieut. Max Weisendorf from the list of supernumeraries to a position made vacant by the appellant's transfer under the first division of said order. [See Record p. 10.]

9th. In holding that the third division of the order of January 2, 1871, lawfully directed that the appellant be mustered out of the service. [See Record p. 10.]

10th. In holding that appellant supposed, or rested his case on the supposition, that the President, under the act of July 15, 1870, became *functus officio* on the 31st of December, 1870. [See Record p. 12.]

11th. In holding that the power of command and control of the Army and Navy of the United States by the President is above and beyond the power of Congress to make rules for the Government and regulation of the land and naval forces. [See Record pp. 11 and 12.]

12th. In holding that the supernumerary list provided for in section 12, existed for the purposes of transfer after January 1, 1871, the time prescribed by said section when the officers then borne thereon should be honorably mustered out of the service. [See Record pp. 12 and 13.]

13th. In holding that the President of the United States could exercise certain of the powers conferred upon him by section 12, after the expiration of the time fixed by said section for the exercise of such powers. [See Record pp. 12 and 13.]

14th. In holding that the President had power to transfer to a supernumerary list, or assign an officer from said list to active duty after such list had ceased exist by the express terms of the statute for the purpose of transfer. [See Record pp. 12 and 13.]

15th. In holding that the President had power to transfer to the supernumerary list, after Dec. 31, 1870, and after such list had ceased to exist, for the purpose of transfer, this appellant who was reported to the board created under the provisions of section 11, and never had an opportunity for a hearing before such board to show cause against his muster out. [See Record pp. 12 and 13.]

16th. In failing to hold that all officers upon the supernumerary list after the 1st day of January, 1871, were lawfully subject only to be mustered out of the service and paid, and were not subject to assignment to the active list. [See Record pp. 12 and 13.]

17th. In not finding for the apppellant in the sum of thirty-four thousand one hundred and twenty-three dollars ($34,123)

18th. In dismissing the appellant's petition.

BRIEF OF ARGUMENT.

1. Being reported as unfit for the proper discharge of his duty for cause other than injuries incurred or disease contracted in the line of his duty, by commanding officer of a military department and by the General of the Army, on the 10th of November, 1870, under the provisions of section 11 of the act of July 15, 1870, (16 Stats. L. p. 315,) [See p. 8 of Record], appellant, then an officer in the military service of the United States, could not be legally mustered out of the service under the said act of July 15, 1870, without being al-

lowed a hearing before the board provided for in section 11 of said act, to show cause against such muster out.

Act March 3, 1869, 15 Stats., L. p. 314–318.
Act July 15, 1870, 16 Stats., L. p. 315.
Official Army Register for 1870.
Official Army Register for 1871.
Congressional Globe, part 2, p. 1848, 2d session 41st Cong.
Congressional Globe, part pp. 3393, 5336, 5343, 5401, 5533 2d session 41st Cong.
United States vs. Bassett, 2 Story, p. 389.
13 Opinions Attorney Genl., p. 353, p. 412.
United States vs. Freeman, 3 Howard, p. 556–565.

2. The 12th section of the act of July 15, 1870, (See p. 9 of the Record) gave to the President authority to transfer certain officers from active duty to the list of supernumeraries, and, prior to January 1, 1871, to fill vacancies on the active list by supernumerary officers; but on the 1st day of January, 1871, the President's authority to fill vacances by assignment from, or to transfer to that list, ceased, and no disposition could legally be made of any supernumerary officer remaining after the 1st day of January, 1871, but to honorably muster him out of the service; and with reference to supernumerary officers the *functions* of the President continued after January 1, 1871, only to honorably muster them out of the service and pay them in accordance with the provisions of the act; that such list ceased on that date, by express provisions of the act of July 15, 1870, except as a designation for honorable muster out, and no transfers could legally be made to or from that list on the 2d day of January 1871.

Brown vs. Barry, 3 Dall, 365.
Minor vs. Mechanics' Bank, 1 Pet, 46.
Thornley vs. United States, 113 U. S. 310.

3. The acceptance or non-acceptance by appellant of the discharge and year's pay, provided for officers discharge under the act of July 15, 1870, with or without protest, did not alter his legal status, if notified of his discharge as a supernumerary officer under the erroneous construction of the law.

Brandt vs. Virginia Coal Co., 93 U. S. R. 326.
Kitchen vs. Duncan, 96 U. S. R. 659.
Morgan vs. Railroad Co., 96 U. S. R. 716.
Opinion Attorney Genl. (in MSS.) March 6, 1886.
General Order Navy Department, No. 344, March 10, 1886.
Redgrave's and Perkin's cases, 116 U. S. 474.

4. The nomination of Wainwright by the President vice Weisendorf promoted, and his confirmation by the Senate, did not operate to supercede appellant, who was a stranger to the Record of nomination and confirmation, and was not a nomination by the President of Wainwright and his confirmation by the Senate, to the office held by appellant, Harlow L. Street.

Official Army Register 1871.
Blake vs. United States, 103 U. S. R. p. 227.
Army Regulations 1863, paragraph 20.

5. A mere memorandum never promulgated as an order, from which the words imparting Presidential direction are erased, differing essentially from the order promulgated on January 2, 1871, cannot be received in evidence to change the Record of the War Department, as to date and purport of General Order No. 1., of 1871, dated January 2, 1871.

Opinion of Court below, citing La Peyere's case 17 Wall. R. 191, also Runkle vs. The United States, 122, U. S., p. 543.

ARGUMENT.

HISTORY OF THE TIMES AND OBJECT OF LEGISLATION.

The act of July 15, 1870, (16 Stats. 315) section 2, provided only for the reduction of the number of *enlisted* men of the army to 30,000 and that after the passage of that act there should be no more than 30,000 *enlisted* men in the army unless otherwise authorized by law. The number of officers were not limited, and were not brought within the statutory limitation of 30,000 men.

The object of the 11th and 12th sections of the act of July 15, 1870, [16 Stats. p. 315] was to sift the entire army and provide for and dispose of unassigned or supernumerary officers of the army, made supernumerary by the act of March 3, 1869,]15 Stats. p. 314–318.] It was the act of March 3, 1869, and not the act of July 15, 1870, which reduced, not the army, but the *Infantry* arm of the military service from forty-five to twenty-five regiments; leaving about four hundred officers of Infantry unemployed or unassigned to duty. These officers are borne upon the official Army Register of 1870, as "Officers of Infantry unassigned to regiments [under act of March 3, 1869.]"

Official Army Register for 1870, published by order of the Secretary of War, in compliance with law.

In disposing of these unassigned Infantry officers, it became the object of the legislature, as provided in section 11 and 12 of the act of July 15, 1870, to retain in

the service the best of such officers, who had not been otherwise provided for by preceding sections of the act, and assign them to places then filled by less desirable officers of Infantry, Cavalry and Artillery, then on active duty; or in other words, to get rid of the poorer and retain the better material throughout the entire army; not merely to *reduce* the army, for if reduction had been the only object, the machinery of section 11 would have been unnecessary.

With a view to reducing the number of officers on the unassigned list, a bill [H. R. No.987] was brought into the House of Representatives by the Committee on Military Affairs in the 2d session of the 41st Congress, being a "Bill, to reduce the number of officers in the Army of the United States, and for other purposes."

Cong. Globe, p. 1848, part 2, 2d session 41st Congress.

This bill with amendments not involved in this controversy, passed the House of Representatives and was sent to the Senate May 12, 1870.

Cong. Globe, p. 1854, part 2, 2d session 41st Congress.

As this bill passed the House, the last clause of what afterwards became the 11th section, of the act of July 15, 1870, inhibiting muster out of reported officers without opportunity for a hearing, was no part thereof; it was amended in the Senate in that regard, plainly with the view to retaining the better material throughout the whole army, and preventing injustice by reason of erroneous or prejudiced reports.

Cong. Globe, p. 3393, part 2d session 41st Congress, in Senate proceedings May 12, 1870.

This bill passed both the House of Representatives and the Senate, with amendments, but failed to become a law, by reason of a disagreement on the part of the Senate, to report of a Conference Committee upon certain amendments not affecting appellant's case.

Cong. Globe, p. 5336 to 5343, part 2d session 41st Congress.

On July 9, 1870, most of the features of bill H. R. 987 as amended, were offered in the Senate, and by it adopted, as an amendment to the pending Army Appropriation Bill, and became part of the act of July 15, 1870, 11th and 12th sections retaining their places in the the bill as it had matured up to this period, including the clause of the 11th section inhibiting muster out of reported officers without allowing a hearing.

Cong. Globe, p. 5401, part July 9, 1870.

Thus, from the history of the times, it is ascertained there were unassigned supernumerary officers whom it was the intent of Congress to employ on the active list, replacing officers less fit for the military service then on that list; but to avoid injustice resulting from erroneous and vindictive reports, or from any cause, a board was provided before which it became mandatory that reported officers should have a hearing; without which their muster-out was inhibited.

The legislature well knew that officers of the army are not exempt from that human frailty which goes by the name of envy or jealousy. They knew very well that there were bitternesses existing between officers of the army, and that very often the grossest injustice is perpetrated toward officers, as well as toward soldiers, by the unfairness and oppressive disposition of their superiors.

They knew that great injustice might be done, and would be done, by persons who were not disposed to act fairly toward their subordinates or their fellow officers of the army. They therefore deemed it expedient that the persons concerned in the report, it being a report for cause in the nature of an accusation, should have notice of the proceeding, should be heard before the board, and have opportunity to show cause to the contrary; that was simple justice, for otherwise the accusations might be entirely unfounded and entirely malicious, and the whole thing up to muster out might be carried on in secret against an officer, who was perfectly innocent, and perfectly meritorious, entirely without his knowledge; resulting in a loss to the service of a good officer and the consequent retention of a poorer one, as well as a successful assault upon property rights under the forms of law, instigated by badly disposed minds for base purposes.

APPELLANT'S MUSTER OUT WAS IN CONTRAVENTION OF THE CLAUSE OF SECTION 11 INHIBITING MUSTER OUT OF OFFICERS REPORTED WITHOUT OPPORTUNITY FOR DEFENCE.

Appellant was reported under the 11th section of the act of July 15, 1870; his name was laid before the board, and the board requested that he might be given an opportunity, without delay, for a hearing, in accordance with the provisions of the law. But the Adjutant General of the Army intervened withdrawing appellant's name from before the board; stating his case, so far as the board was concerned, was viewed as closed, and assigning as a reason therefor the remoteness of appellant's station, and the consequent lack of time in which to consider the case by the board.

The language of the section authorizing the board did not limit its sitting as to time. The object of the board was to pass upon the cases of reported officers, and it was the duty of the board to sit until all such cases were disposed of; lack of time was therefore no reason for withdrawal of appellant's name. But it is a matter of which this court may take judicial notice however, that Fort Bidwell, appellant's station, is situated in the State of California, then as now within 120 miles of a railroad and within that distance from telegraphic communication with the city of Washington where the board sat, and that in the ordinary course of travel and means of communication, appellant could have been in Washington within twelve days at furthest from the date of the request of the board, or by the 29th day of November, 1870, and that there was in fact, ample time for his appearance before the board. There was, however, no effort made to give appellant an opportunity to appear; he was held for transfer to the list of supernumeraries because of the accusing report of which he had no knowledge, and was subsequently mustered out of the service without opportunity to show cause against it and because thereof.

It is submitted such muster out was in direct violation of the inhibition imposed by the act authorizing his accusation by report of unfitness for the service, and under which he was actually accused. He was denied his day in court specifically guaranteed by the act under which he was erroneously mustered out, and without which his muster out was inhibited. If it shall be held by this court, as by the court below, that section 12 was comprehensive enough to embrace every officer of the Army, then of what effect was section 11? If officers reported to the board, whose cases were pending before

it, were subject to muster out by way of transfer to the supernumerary list, *without opportunity for defense*, it was clearly within the authority of the President to nullify that part of section 11, providing for *hearing and defence*, thus placing the power of command and control of the Army and Navy of the United States, by the President, above and beyond the power of Congress, to make rules for the government and regulating of the land and naval forces.

Statutes are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provisions nor inconsistent with the objects of the statute.

United States vs. Bassett, 2 Story, p. 389.

Giving effect to the words guaranteeing to reported officers a hearing, is reasonable, consistant with the object of the statute, and is clearly not repugnant to its provisions, but strictly under its express provisions.

The 11th section embraces four distinct clauses:

The first clause is *mandatory* upon the General of the Army, and commanding officers of the several military departments of the army; they *shall*, as soon as practicable, after the passage of the act, forward to the Secretary of War, a list of officers serving in their respective commands, deemed by them unfit for the proper discharge of their duties from any cause except injuries incurred or disease contracted in the line of their duties, setting forth the cause of such unfitness. The second clause is *mandatory* upon the Secretary of War authorizing and directing him to constitute a board, and specifying the rank and class of officers, of which the board shall consist, but no power is given this officer to originate charges or reports or to have jurisdic-

tion over the proceedings of the board. The third clause is *mandatory* upon the President to muster out of the service reported officers on recommendation of the board. The fourth clause is a *mandatory* inhibition against muster out without opportunity being given to the reported officer for a hearing to show cause against it. Here we have the accusation, the court with jurisdiction to hear and determine, the President directed to carry into effect the recommendation of the court, but without authority to interpose clemency, and inhibited from executing the penalty without accused shall have a hearing. So that, clearly, if effect be given to the 11th section, no muster out of reported officers without a hearing was authorized, and the 12th section was not comprehensive enough to embrace such officers as were embraced specifically in the 11th section.

Nor was the President constituted the sole agent of the Government, to execute the legislative fiat, for that, under this section, the board was the sole competent judge of unfitness of the reported officer, and the sole function of the President was to carry into effect the recommendation of the board. To this effect the Attorney General has already held on December 14, 1870, 13 opinions, p. 353, in these words, after quoting section 11:

"The language of the statute being mandatory, and positive, I think that no discretion is reserved to the President, and that when the reported officer has been allowed a hearing before the board, and the board recommends that he be mustered out, the President must carry the recommendations into effect."

It is submitted this is the correct view, as also the further view expressed by the Attorney General, in his

opinion upon the question of the jurisdiction of the board in case of reported officers. [Vol. 13, p. 412 of Opinions of the Attorney General] as follows: "I am thus brought to the conclusion that an army officer reported as unfit, either by the General of the Army or the Commander of a Department in which he was serving at the time, was *legally before the board.*"

The jurisdiction acquired by act of report continued, and the officer was legally before the board until opportunity for defence and action by the board upon the cause of unfitness embraced in the report; and it did not lie within the power of the Adjutant General, the Secretary of War nor the President, to consider the case of such reported officer as "closed" pending a request for his appearance in accordance with the provisions of the law, whether his station was near to, or remote from, the board.

The meaning of the legislature in a statute may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeds, from the end in view, or the purpose designed; with this limitation, that to extend the meaning to any case not included in the words, the case must be shown to come within the *same* reason upon which the lawmaker proceeded, not merely a *like* reason.

United States vs. Freeman, 3 Howard, 556–565

The department and court below went far beyond this rule, in holding that the act might be extended to embrace within section 12, all the officers of the army.

In the case of reported officers, the legislature proceeded upon the theory of an opportunity for *defence.* In case of supernumerary officers transferred from the active list to that condition by the President, and al-

lowed so to remain until January 1, 1871, *no* hearing or defence was contemplated by the legislature. In the one case a hearing *and* defence: in the other *no* hearing and *no* defence.

It is a mistake to maintain that the *same* reason which assured to appellant a hearing and defense, with a view to determining his fitness, also permitted him to be *deprived* thereof. Yet to that point was the meaning of the law-maker extended when appellant's name was withdrawn from before the board and he was held for transfer to the supernumerary list, and to that extent has the court below gone in sustaining that construction of the law. It amounted to legislation by the department, not the construction of an act of Congress. No warrant can be found for such action in law; it was without warrant of law and wholly void.

Had Congress intended to vest in the President or in the Secretary of War the *sole* power of selecting officers to be mustered out, no board would have been directed. If the President or Secretary of War had authority to select from among the officers reported *which* should go before the board, he had authority to refuse to send *any* there; he had authority to transfer *all* officers reported to the supernumerary list if he had authority to transfer one, thus rendering the provisions of section 11 nugatory.

Following the rule laid down in Freeman's case, the meaning of the act was very properly extended to whatever was in the line of the purpose of Congress, viz., to get rid of the poorer officers and retain the better, but not beyond or in opposition to that purpose. It must have been the *same* purpose, not even a *like* purpose. A reported officer may have been *a very good one;* that was determinable by a hearing after report.

Congress foresaw that, and it was the purpose of Congress to retain such, and therefore the board was created to hear and determine the question of fitness, and the law *protected* the accused officer pending the determination of that question, from assault in any other direction, by inhibiting his muster out without a hearing.

Whether or not it would have been competent for the President to transfer an officer to the supernumerary list who had been reported to the board, given an opportunity for defence, successfully defended himself against the accusation and stood acquitted by the board, is not within the line of the present inquiry; the case is strictly confined to that of this appellant who was reported, whose name went legally before the board; on that report the board had not acted and no opportunity for defence had been given, and pending action by the board and opportunity for defence, appellant was mustered out of the service. But in no case did the action of the Adjutant General of the Army in closing appellant's case, in failing to give appellant notice, and a hearing before the board, remand him to the same position he occupied before report, or that he would have occupied had no report been made against him. As the very purpose of the transfer to the supernumerary list under section 12 was muster out, the President, or other executive officer acting for him, had no power to so transfer or muster appellant out while menaced by the accusation embraced in the report, before a hearing to show cause to the contrary.

Referring again to the "Bill to reduce the number of officers in the Army of the United States, and for other purposes," being House Bill No. 987, which was the original proposition laid before the legislature for a law disposing of the unassigned or supernumerary officers,

but which failed to pass, it will be found the full text of the 1st section thereof was as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby authorized and directed to assemble a board to consist of one Major General, two Brigadier Generals and two Colonels, who were in active service in the army during the late war, two or more of said officers to be selected from among those appointed to positions in the regular army on account distinguished service in the volunteers. It shall be the duty of said board to examine fully into the military record, qualifications, and general fitness of all officers of the army, whether of the line or staff, below the rank of Brigadier General, and upon such examination to recommend for appointment or transfer to vacancies, or retention in the positions of present assignment in the staff corps and departments, or in the regiments of artillery, cavalry or infantry, such officers as the board may decide to be best fitted to fill the same, on account of previous active service, willingness to continue to do duty, and moral standing. The commanding officer of each of the several military departments and chiefs of the several staff departments of the United States, shall, as soon as practicable after the passage of this act, forward to the Secretary of War, for the information of said board, a list of officers serving in, or borne on the rolls of their respective departments, whether of the line or staff, who, by reason of inexperience, inefficiency, immoral conduct or othef cause, have given evidence of want of adaption to the military service, and who, for the reasons above mentioned, can, without detrinment to the service, be mustered out of the army. The board shall report their recommendations when determided upon to the President, and the President, provided he shall approve said report, is hereby authorized to make and order such transfers, and, by and with the advice and consent of the Senate, to make

such appointments as he shall deem proper, of the officers so recommended, to vacancies then existing in the line or staff, or which may occur within the space of six months thereafter, and all of the said officers who shall not be so recommended by said board for transfer or appointment, shall, from and after the approval of said report by the President, be honorably mustered out of the army of the United States. And also all officers whose names are in the list so recommended by said board, who shall not be transferred or appointed as aforesaid by the President within said space of six months, shall, in like manner be honorably mustered out of the Army of the United States.

Provided, That from and after the passage of this act, and until the end of said term of six months, no transfers or appointments shall be made except from the list so recommended to the President by said board.

Congressional Globe, p. 1848, part 2, 2d session 41st Cong.

This section embraced all in the original bill, as introduced, which finally became the law, as embraced in the 11th and 12th sections of the act of July 15, 1870. It provided for a board and for a report and muster out of officers on active duty, as does the 11th section of the act under consideration, and also for transfers and appointments to vacancies upon the active list, and the honorable muster out of officers on the unassigned list who shall not be recommended for transfer or appointment to the active list, as does section 12, but all this subject to the approval of the President. It was contemplated to be the duty of the board, as an *ex-parte* proceeding, to examine into the military record, qualifications and general fitness of all officers of the army below the rank of Brigadier General, and to pass upon and recommend to the President for muster out, officers reported by commanding officers of depart-

ments and chiefs of staff; and upon the approval by the President of the recommendations of the board he was authorized to make transfers and honorably muster out.

Looking at this bill as originally introduced in connection with the 11th and 12th sections of the act of July 15th, 1870, the tendency of legislation, as the bill progressed toward an act, and finally became the law, was clearly to restrict and define the duties of the President and the Board, and protect officers reported, who might be unjustly reported, by assuring to such a hearing. To that end, as the legislative intent finally found expression in the act of July 15, 1870, officers on the active list who were to be considered for honorable discharge, were seggregated into two classes: the one class being officers *reported for cause;* the other, officers *selected by the President for transfer to the supernumerary list and muster out.* The one embraced in the provisions of section 11 of the act, the other in those of section 12; the one reported for unfitness in the nature of an accusation, guaranteed an opportunity for hearing and defence, but absolutely subject to muster out upon recommendation of the board convened to try the question of fitness for the service, without the possibility of the intervention of executive clemency; the other, wholly dependent upon executive scrutiny, and subject to selection for transfer to a supernumerary list within a specified limit of time, and muster out accordingly. The act of *report*, of *accusation*, separated such officers so reported from all others, and constituted them a class distinct from those not so reported. The former were dealt with under section 11, the latter under section 12. In the former, executive authority was limited to muster out on recommendation, but mandatory on such recommendation; in the latter,

the President was unlimited in selection for muster out by transfer to the supernumerary list, *except* by the inhibition to muster out reported officers not given a hearing. So that, while under the bill as *originally introduced*, the President may have been the *sole* agent of Congress in executing the legislative fiat, his powers and duties were limited by the 11th and 12th sections of the act as passed, to the honorable muster out of reported officers on recommendation of the board, and of officers selected by him for transfer to the list of supernumeraries *prior* to January 1, 1871, and further limited by the inhibition imposed by the last clause of section 11, against muster out of a reported officer without allowing such officer a hearing before the board. The modifications in the act as passed, from the bill as originally prepared, can bear no other reasonable construction. Appellant's muster out is exactly what was directed should *not* take place.

APPELLANT'S CASE UNDER THE PROVISIONS OF SECTION 12, ACT JULY 15, 1870.

Being reported, and inhibited from muster out without opportunity for defence, under section 11, he could not legally be mustered out by transfer to a supernumerary list, in the absence of such opportunity for defence; but especially could he not be so transferred to a supernumerary list after that list ceased to exist for the purpose of transfer, by express legislative enactment. Appellant does not contend, as is held by the Court below, that the President became *functus officio* December 31, 1870. It was not the official duty of the President that terminated December 31, 1870, but the *object* or *thing* upon which that duty was to be exercised; That *object* or *thing* was supernumerary officers, those on that date exceeding the number wanted; changes

in the persons constituting that list of officers had occurred under the law from time to time, from the date of the approval of the act of July 15, 1870. The President was authorized to add to and take from the list of supernumerary officers; "but if any supernumerary officer shall remain after the 1st day of January next (1871) they shall be honorably mustered out of the service," &c. That fixed a limit upon the retention in office of any and all supernumerary officers, and specifically pointed out what should be done with such, or officers remaining such, after January 1, 1871. Congress was not seeking to confer a privilege upon the President, or a benefit upon the officer. It was dealing with an existing evil, a number of supernumerary officers of the army, and whether it was a benefit conferred upon the officer, or a damage by deprivation of his hitherto legal right to exercise an office and receive the emoluments attached thereto, was not necessarily in the mind of the legislature; dealing with that specific supernumerary list, a then existing evil, it provided for a shifting and change of officers who were included within it, up to a specific date, giving a limited discretion to the President as to whom he might change from a condition of activity to one of non activity; from a condition of employment to one of non-employment; from a condition of being wanted to that of exceeding the number wanted, and *vice versa*, by transfer to and from that list; but a specific date was fixed after which these particular supernumeraries should be mustered out of the service, and the existing evil should end That date was January 1, not January 2, 1871, and the date at which the President was limited in adding to that supernumerary list from the active list was *prior* to January 1, 1871, that is, December 31, 1870; and therefore the supernumerary officers, such as were supernumerary on Sunday,

January 1, 1871, were to be mustered out of the service, and no other disposition could legally be made of them. But the President's function with reference to the Act of Congress did not necessarily cease on that date, but his duty after that date was confined to the honorable muster out and pay of officers supernumerary prior to the 1st day of January, 1871. It was incumbent upon him to muster out and pay officers supernumerary on January 1, 1871; it was not within his authority to change the status of any such supernumerary officer after that date.

The act herein construes itself. When the intention of the legislature in enacting a law can be discovered from the language used, it should prevail.

Brown vs. Barry, 3 Dall, 365.
Minor vs Mechanics' Bank, 1 Pet. 46

When the meaning of the statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction.

Thornley vs. United States, 113 U. S., 310.

It therefore follows that the pretended transfer of appellant to the list of supernumeraries on January 2, 1871, to take effect January 1, 1871, was without legal authority and void; and that the pretended assignment of Lieut. Max Weisendorf from the supernumerary list *vice* appellant transferred to that list, was also without authority of law and void, as was also the pretended muster out of appellant under the same order, being General Order, No. 1, dated January 2, 1871. But the pretended order transferring appellant to the supernumerary list did not reach him until February 11, 1871, and there is no pretention that he had notice of his assault by report or transfer to the supernumerary list, prior to that date. It is therefore further submitted that it was not contemplated by the

terms of the act to transfer officers from the active to the supernumerary arm of the service by merely *listing* the names of the officers to be transferred. To carry out the reasonable intent of the act required a presidential order of transfer prior to January 1, 1871, and prior to that date orders relieving the officer transferred to the supernumerary list from active duty should have reached him at his post of duty. It is submitted that no transfer to the unassigned or supernumerary arm of the service was complete and effective until the officer affected was relieved from active duty Such transfer was contemplated by the act to be an actual, corporeal transfer from a condition of employment to one of non-employment; to one in the condition exceeding the number wanted That could not be done in the order of things so long as appellant was actually employed on active duty So that whatever fell short of relieving him from active duty prior to January 1, 1871, fell short of placing him on the supernumerary list, and was short of the plain letter of the act Appellant was on duty until February 11, 1871. The supernumerary list with which Congress dealt in the act of July 15, 1870, had then been out of existence for the purpose of transfer for one month and twelve days.

RECEIPT OF ONE YEAR'S PAY.

This appellant was paid September 18, 1871, the year's pay, provided for officers mustered out under the act of July 15, 1870, part of which ($117 95,) he was constrained to refund on the ground that he, being a supernumerary officer, should have been paid at infantry rates only; this sum of $117.95 was not finally paid to him, till February 18, 1881; so that on the 18th of September, 1871, by far the greater part of the money received had been

actually earned and was then due appellant. He was in fact paid in advance but a trifling sum.

Appellant had no notice of the accusation in the form of a report having been made against him, and no notice or knowledge of the circumstances surrounding his discharge when he accepted his pay. He was not in a position where he could have had such notice, unless specifically given him; such notice cannot therefore be presumed; his acceptance of the pay therefore cannot operate as an estoppel concluding him from questioning the regularity of his discharge.

An estoppel *in pais* in its typical character is the effect of an indisputable admission arising from the fact that the party claiming it has been induced by the action of the party against whom it is claimed, to change his position.

For the application of the doctrine of equitable estoppel there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury.

Brandt vs Virginia Coal Co., 93 U S R., 326.

And again this Court has said, in Kitchen vs. Duncan:

"An estoppel *in pais* can be set up only by a person who has been misled to his injury"(96 U S., 659.)

And again in Morgan vs Railroad Co:

"The doctrine always presupposes error on one side and fault or fraud upon the other, and that it would be inequitable for the party against whom the doctrine is asserted to take the advantage" (96 U S., 716)

The appellant never by any act of his placed the appellee in a position where the doctrine of estoppel as herein laid down can be held against him in con-

nection with receipting for his pay. The facts point in a contrary direction. He did not receive his pay for the year 1871, until in September, 1871, nor all of it till April, 1881. It is a matter of which this court may take judicial notice that the pay of 1st Lieutenant of Cavalry is $1,600 per year. Appellant's circumstances at the end of eight months may be fairly presumed to have been so straitened as to operate in the nature of duress, constraining him to accept his salary on any terms he could get it. Again, his voucher was made up for one year's pay, and that alone could be paid him by reason of the erroneous action of the Department in ordering his muster out The appellant by that act on the part of the appellee was constrained and misled into accepting his pay for a greater period than was actually due, and if estoppel were to operate in this case on either side it would be applicable in favor of appellant and against the United States, in concluding the appellee from setting up the acceptance of payment as an acquiescence, on appellant's part, in the regularity of his discharge.

But departmental action and the opinion of the Attorney General have concurred in this view in a comparatively recent case, exactly similar to appellant's so far as the acceptance of the one year's pay affects it. That case was as follows: Certain cadet engineers were discharged under the act of August 5, 1882, with a gratuity of a year's pay, as in the case of officers under the 11th and 12th sections of the act of July 15, 1870. The cases of Redgrave and of Perkins, two of such cadet engineers, were brought against the United States based upon the alleged erroneous discharge by the Secretary of the Navy of such engineers, under said act of August 5, 1882. This court sustained the opinion of the court below in holding the discharge of such cadets illegal. [See 116

U. S., 474.] The question then arose as to the status of such of the cadets as had accepted the one year's pay, and thereupon an opinion of the Attorney General was sought by the Secretary of the Navy, and he, under date of March 6, 1886, (Mss. Opinions of the Attorney General) held that: "The acceptance or the non-acceptance of the discharge and year's pay, with or without protest, did not alter the legal status of any cadet engineer who was designated and notified of his discharge as a surplus graduate under the erroneous construction of law." Twenty-seven cadet engineers were restored to duty by General Orders No. 344 of the Navy Department, dated March 10, 1886, immediately following the above opinion of the Attorney General, and based thereon. The same doctrine is applicable to appellant.

APPELLANT IS NOT AFFECTED BY THE ERRONEOUS ASSIGNMENT OF WEISENDORF *vice* STREET, AND THE SUBSEQUENT NOMINATION AND CONFIRMATION OF WAINWRIGHT *vice* WEISENDORF.

While General Order No. 1, dated January 2, 1871, purports to assign 1st Lieut. Max Weisendorf to the *place*, not to the *office*, made vacant by the erroneous transfer of appellant to the supernumerary list, no such assignment was in fact accomplished. The Official Army Register of 1870, (published by authority &c.,) to which reference has already been had, bears Max Weisendorf among the officers of Infantry unassigned [see p. 162, 2d name.] He was commissioned 1st Lieutenant of Infantry, April 21, 1868. The same Register bears Harlow L. Street, (appellant) as a 1st Lieutenant on the active list, 1st Cavalry, commissioned February 22, 1869, (see p. 39); the name of appellant *follows that of Grant* on the Official Register for 1870. On the Official Register for 1871, the year following, page 40, Weisendorf, who had in the interim been

assigned under General Orders, No. 1 of 1871, to the 1st Cavalry, *holding his infantry commission*, is borne *ahead of Grant*, as commissioned April 21, 1868. The actual relative places being appellant *junior* to Grant, while as assigned Weisendorf was placed *ranking* Grant. Weisendorf did not therefore in fact take the place of appellant, but that of some other in advance of appellant, if he legally took any place, which is disputed. It cannot be maintained that he took the *office* of appellant, for Weisendorf was an *Infantry* officer, while appellant was an officer of *Cavalry;* but he did not even take the place of appellant on the Army Register. The place Weisendorf took, and the place of Grant, (both 1st Lieutenants,) must have been filled by nomination and confirmation before the place held by appellant on the official roster could have been reached as a vacancy.

Weisendorf's commission in *Infantry*, under which he was assigned, ranked appellant's commission in *Cavalry* (see Official Army Registers heretofore cited,) ten months and nine days; Weisendorf was promoted two files in advance of any promotion appellant could have had. Promotion to the rank of Captain shall be made regimentally [Army Regulations, 1863, ¶ 20.] No one can therefore undertake to say which of the many 2d Lieutenants who have been commissioned in the 1st Cavalry since appellant was commissioned a 1st Lieutenant, or whether either of them, would have been nominated by the President and confirmed by the Senate in the place of appellant, promoted to a Captain, if he had not been illegally removed from duty with his regiment. That belongs to the field of conjecture.

But the rule laid down by this court in the case of Blake vs United States, (103 U. S., 227) respecting removal of officers of the Army by nomination of a successor by the President, and his confirmation by the Sen-

ate, does not contemplate the removal of a third party, a stranger to the record of nomination and confirmation This court has held in the case just cited, as follows: "It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supercede the latter, who thereby, in virtue of the new appointment, ceased to be an officer of the Army." It is submitted that under this rule, to work the removal of appellant by the appointment and confirmation of Wainwright, he, Wainwright, must have been nominated and confirmed to the office of appellant by *name*, or by such other designation as would point specifically to the office held by appellant. There are, under the law, fourteen 1st Lieutenants in each cavalry regiment. Any designation to the office of appellant, other than by name, coupled with his rank, regiment, and arm of the service, would fail in describing his office, and therefore fail in superceding him by appointment and confirmation of another thereto. But Wainwright was appointed and confirmed to the *office of Weisendorf*, an *Infantry* 1st Lieutenant, an entirely different office from that held, or ever held, by appellant. The position of 1st Lieutenant of the 1st U. S. Cavalry, being an Office within the meaning of the Constitution of the United States, could only be filled by nomination thereto by the President and confirmation of the Senate; it could not be filled by assignment under an executive order; the authoriiy given to the President to fill vacancies in the active list by assignment from the list of supernumeraries, contemplated the filling of such vacancies by constitutional methods. It is not pretended Weisendorf was ever nominated and confirmed as 1st Lieutenant of the 1st U. S. Cavalry, and he never was in fact a 'st Lieutenant of the 1st U. S. Cavalry.

Again, no *vacancy* existed in the office held by this

appellant *prior* to January 1, 1871; if no vacancy existed, no transfer to such a vacancy could be legally made under the 12th section. If a vacancy in the grade of 1st Lieutenant existed in the regiment at all, prior to the 1st day of January, 1871, it was clearly not in the office of this appellant, and Weisendorf never took the office of appellant by the pretended transfer under General Order No. 1 of 1871. The circumstances involving the erroneous or illegal pretended transfer of Weisendorf vice this appellant, followed by the appointment and confirmation of Wainwright vice Weisendorf, cannot be held, under the rule in the Blake case, to supercede this appellant.

The judgment of the court below should therefore be reversed, and judgment entered according to the prayer of appellant's petition.

J. M. VALE,
Attorney for Appellant.

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

HARLOW L. STREET, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } 1123.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

HARLOW L. STREET, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1123.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The statement of the case as set forth in the brief of appellant is not controverted.

Under the opinion and judgment in the *Hildeburn Case* (13 C. Cls. R., 62) the claimant was without standing in the Court of Claims.

It was conceded that the order of January 2, 1871, was in a degree irregular. It was conceded that the money was received under protest, and the validity of the order of January 2, 1871, was denied.

The opinion in the *Hildeburn Case* was afterward affirmed by the same court (*Duryea* v. *The United States*, 17 C. Cls. R., 38).

It is claimed that since the rendition of judgment in that case, the Attorney-General has held an opposite view in the case of cadet engineers discharged under the act of 1882 (opinion of March 6, 1886).

It is also urged that in *Redgrave's Case* (29 C. Cls. R., 226; 116 U. S. R., 474) the opinion rendered in *Hildeburn's Case* (*supra*) was overruled.

Neither in the facts involved nor in the questions at issue is there any parallel between the naval cadet cases and the present case.

The findings of fact show that Lieutenant Street, in pursuance of the provisions of the act of July 15, 1870, was reported as unfit for duty under the specific charge that he was "unfit for the proper discharge of his duties from other causes than injuries incurred or disease contracted in the line of his duties."

The matter was referred to the board convened in pursuance of said act.

Owing to the remoteness of the post at which claimant was stationed, his case, so far as the board was concerned, was considered closed, and the papers returned by the board to the Adjutant-General of the Army.

Action was then taken on his case under the provisions of section 12 of said act. (See General Order No. 1, on file, dated January 2, 1870.)

Under the provisions of section 11 of said act it is contended in claimant's brief that, Lieutenant Street's name

having been reported to the board, he could not be legally mustered out by transfer to the supernumary list without allowing him a hearing before such board to show cause against it.

Whilst as a matter of fact the name of Lieutenant Street was withdrawn from the board, and he was mustered out of the service under the provisions of section 12 of said act, it is submitted that the claimant misapprehended the force and effect of section 11.

> The board of officers was an *ex parte* advisory board, intended merely to assist the President in the unpleasant duty of reducing the Army by a process of weeding out the least efficient officers, and it was *in no sense a court or quasi judicial tribunal.* (*Shereburne* vs. *The United States*, 16 C. Cls. R., 499); *Duryea* vs. *The United States*, 17 C. Cls. R., 24.)

The President is not bound by the action of the board. (*Duryea's Case, supra.*)

The board of officers referred to in section 11 did not constitute a court-martial; it had no power to try offenses or inflict penalties.

Such board being simply advisory in its character, the President, at his option, might or might not invoke its aid. He might ask advice and then withdraw the request.

This was done in Street's case. The advice of the board was dispensed with. By its non-action the President was deprived of no power he otherwise possessed. Street was in the same position as he would have been had his case never been presented to the board.

Without reference to section 11 of said act of 1870, under the provisions of section 12 of said act the Presi-

dent was "authorized to transfer officers from the regiments of cavalry, artillery, and infantry to the list of supernumeraries." It was not required by said section that any specific charges should be made against the officers so transferred. Congress declared that the number of officers of the Army should be reduced, and gave the power to do so to the President.

Under the provisions of section 11 he could, upon the recommendation of the board of officers therein provided, muster an officer out of the service forthwith. Under the provisions of section 12 of the act, he could transfer certain officers to the supernumerary list. Lieutenant Street was not mustered out under the provisions of section 11. His case was not heard by the board. He was placed on the supernumerary list, by order of the Secretary of War, December 31, 1870. He was mustered out under the clause in section 12 of said act relating to the mustering of supernumerary officers out of the service.

The proceedings in the present suit were regular. The transfer of Street to the list of supernumeraries was (notwithstanding formal order of January 2, 1871) actually made and order signed by the Secretary of War December 31, 1870.

Whether the order was in the first instance regular or not, its legality has been repeatedly recognized by Congress.

Act of March 3, 1875 (18 Stat. L., 497). Section 2 of said act refers to "any person who was mustered out as a supernumerary officer of the Army with one year's pay and allowances" under said act of 1870.

Act April 8, 1878, for the relief of John A. Darling. (20 Stat. L., 35.)

Act February 25, 1879, to authorize the restoration of Michael O'Brien to the rank of first lieutenant in the Army (20 Stat. L., 321).

Act March 3, 1879, for relief of Philip W. Stanhope (20 Stat. L., 354).

Act for relief of Redmond Tully (21 Stat. L, 510).

It will be observed by reference to the order of February 2, 1871, that Capt. John A. Darling, First Lieut. Michael O'Brien, Capt. Philip W. Stanhope, and First Lieut. Redmond Tully were all transferred, by virtue of such order, to the list of supernumeraries.

It will also be observed by reference to said acts, that any pay by virtue of first service is in all cases prohibited.

Assuming the order of January 2, 1871, mustering Lieutenant Street out of the service, to have been irregular and non-operative, the appointment of First Lieutenant Max Wesendorff by the President, with the approval of the Senate, to fill the vacancy, would operate as a removal of claimant and sever his connection with the Army.

> From the organization of the Government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in absence of statutory regulations, to dismiss from the service an officer of the Army or Navy, was not questioned in any adjudged case, or by any department of the Government.
> * * * Our conclusion is that there was no purpose by the fifth section of the act of July 13, 1866,

to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place. (*Blake* vs. *The United States*, 103, U. S. R., 227.)

In 1789 Congress affirmed the power of removal in the President alone. This power in the President has never been questioned since either in the civil or military offices. (*Gratiot's Case*, 1 C. Cls. R., 258.)

After dismissal by the President the office becomes vacant, and can only be filled by appointment by the President, confirmed by the Senate.

In the earlier cases in the Court of Claims, the power of the President to revoke the order, when made by mistake or under a misapprehension as to the facts, was recognized. (*Smith* vs. *United States*, 2 C. Cls. R., 206; *Winter* vs. *United States*, 3 C. Cls. R., 137; *Reynolds* vs. *United States*, 3 C. Cls. R., 198; *Barnes* vs. *United States*, 4 C. Cls. R., 217.)

In subsequent cases the above decisions have been explained.

In *Montgomery* vs. *United States* (5 C. Cls. R., 94), it was held that the power of the President to revoke the order was limited, viz: Not to exceed the number of quartermasters fixed by law; nor to restore to an officer who has been dismissed the service, by revoking the dismissal, the pay which has rightfully been paid his successor.

In *Mimmack* v. *United States* (10 C. Cls. R., 584) it was held that if the resignation of an officer was accepted by the President, the official relation of such officer to the Army was severed, only to be re-established by a re-

appointment approved by the Senate. The order of the President revoking the acceptance could not effect a restoration. *Mimmack's Case*, (*supra*,) was affirmed by the Supreme Court (97 U. S. R., 426).

Since the decision in the Mimmack Case it has been repeatedly decided that when, for any reason, an officer of the Army or Navy loses his position, nothing short of a new appointment, confirmed by the Senate, can have the effect of restoring him to the office. (Opinion Atty. Gen'l Evarts, 12 Ops., 555; *Dubarry's Case*, 4 Ops., Atty. Gen'l, 603; *Bennett's Case*, 19 C. Cls. R., 379; *McElrath's Case*, 12 C. Cls. R., 584, 102 U. S. R., 12,426; *Miller's Case*, 19 C. Cls. R., 338; *Badeau's Case*, 15 Ops. Atty. Gen'l, 407; *Blake's Case*, 14 C. Cls. R., 462; 103 U. S. R., 227; *Montgomery's Case*, 19 C. Cls. R., 370; *Bennett's Case*, 19 C. Cls. R., 379; *Palen's Case*, 19 C. Cls. R., 389; *McBlair's Case*, 19 C. Cls. R., 528; *Vanderslice's Case*, 19 C. Cls. R., 480; *Corson's Case*, 17 C. Cls. R., 344; 114 U. S. R., 619.)

The right of the President to remove an officer of the Army and want of power to re-establish him in his position without a new appointment, approved by the Senate, is therefore established by decisions of this court and the Supreme Court.

It follows that a new appointment to the place of an officer of the Army or Navy supersedes such officer; is equivalent to a dismissal; removes him from office, and severs his connection therewith. (*Blake* vs. *United States*, 10 C. Cls. R., 584; 47 U. S. R., 496; *McElrath* vs. *United States*, 12 C. Cls. R., 201; 102 U. S. R., 426.)